

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 JEMAR D. MATTHEWS,
9 Petitioner,
10 vs.
11 DWIGHT NEVEN, *et al.*,
12 Respondents.

2:14-cv-00472-GMN-PAL

13 _____ /
14
15 **ORDER**

16 Introduction

17 This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Jemar
18 D. Matthews, a Nevada prisoner. The respondents have filed a motion to dismiss. The court will
19 grant respondents' motion to dismiss in part and deny it in part. The court determines that three of
20 Matthews' claims are unexhausted in state court. The court will direct Matthews to make an election
21 to either abandon the unexhausted claims or move for a stay of this action so that he may exhaust
those claims in state court.

22 Background

23 Matthews was convicted on July 17, 2007, following a jury trial in Nevada's Eighth Judicial
24 District Court, in Clark County, of conspiracy to commit murder, murder with use of a deadly
25 weapon, three counts of attempted murder with use of a deadly weapon, possession of a sawed off
26 rifle, conspiracy to commit robbery, two counts of robbery with use of a deadly weapon, and two

1 counts of assault with a deadly weapon. *See* Judgment of Conviction, Exhibit H.¹ Matthews was
 2 sentenced to the following prison terms, all to run concurrently:

3	Count 1	conspiracy to commit murder	26 to 120 months
4	Count 2	murder with use of a deadly weapon	two consecutive sentences of 20 years to life
5	Count 3	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
6	Count 4	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
7	Count 5	attempted murder with use of a deadly weapon	two consecutive sentences of 48 to 240 months
8	Count 6	possession of a sawed off rifle	12 to 48 months
9	Count 7	conspiracy to commit robbery	12 to 72 months
10	Count 8	robbery with use of a deadly weapon	two consecutive sentences of 40 to 180 months
11	Count 9	robbery with use of a deadly weapon	two consecutive sentences of 40 to 180 months
12	Count 10	assault with a deadly weapon	16 to 72 months
13	Count 11	assault with a deadly weapon	16 to 72 months

17 *See id.*

18 In its order affirming the judgment of conviction, the Nevada Supreme Court succinctly
 19 described the factual background of the case as follows:

20 In this case, appellant Jemar Matthews and three other young men walked up
 21 to a group of people standing outside a friend's house and opened fire, killing one
 22 victim with a shot to the head and injuring another. In attempting to flee the area, the
 shooters robbed a vehicle at gunpoint and a police chase ensued, resulting in
 Matthews' capture.

23 Order of Affirmance, Exhibit 33, p. 5.

24

25

26 ¹ The exhibits referred to in this order were filed by respondents, and are located in the record
 at ECF Nos. 17, 18, 19 and 20.

1 The Nevada Supreme Court affirmed the judgment of conviction on June 30, 2009.
 2 *See Order of Affirmance*, Exhibit J. That court denied Matthews' petition for rehearing on
 3 September 28, 2009. *See Order Denying Rehearing*, Exhibit L. The court then denied Matthews'
 4 petition for en banc reconsideration on October 12, 2009. *See Order Denying En Banc*
 5 *Reconsideration*, Exhibit N.

6 On December 14, 2010, Matthews filed a post-conviction petition for writ of habeas corpus
 7 in the state district court. *See Petition for Writ of Habeas Corpus*, Exhibit O; Amended
 8 Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-
 9 Conviction), Exhibit P. The state district court held an evidentiary hearing (*see Recorder's*
 10 Transcript of Proceedings, Exhibit Q) then denied the petition, in a written order filed on
 11 November 13, 2012. *See Findings of Fact, Conclusions of Law and Order*, Exhibit R. Matthews
 12 appealed, and the Nevada Supreme Court affirmed the denial of Matthews' state habeas petition on
 13 January 16, 2014. *See Order of Affirmance*, Exhibit T.

14 This court received Matthews' federal habeas petition, initiating this action *pro se*, on
 15 March 28, 2014 (ECF No. 6). The court granted Matthews's motion for appointment of counsel, and
 16 appointed counsel to represent him. *See Order entered August 29, 2014* (ECF No. 5); *Order entered*
 17 September 10, 2014 (ECF No. 9). With counsel, Matthews filed a first amended habeas petition
 18 (ECF No. 14) on January 9, 2015. Matthews' first amended petition asserts the following claims:

- 19 1. "Mr. Matthews' rights to [a] fair and impartial trial, due process, and equal
 20 protection fo the law under the Fifth, Sixth and Fourteenth Amendments to the
 21 Constitution were violated in his state court prosecution because there was not
 22 sufficient evidence on which to convict him." First Amended Petition (ECF
 23 No. 14), p. 7.
- 24 2. "Mr. Matthews' rights to a fair trial, due process and equal protection of the
 25 law were abrogated in violation of [the] Fifth, Sixth and Fourteenth
 26 Amendment guarantees by the pervasive prosecutorial misconduct evidenced
 27 during trial and at rebuttal closing." *Id.* at 21. Respondents reasonably
 28 construe Claim 2 to include four subclaims, each asserting a different specific
 29 allegation of prosecutorial misconduct:
 30 (a) the prosecutor committed misconduct by urging the jurors to
 31 stare at Matthews and scrutinize his attire;

- (b) the prosecutor committed misconduct by questioning Matthews' opposition to a key piece of evidence, a pair of red gloves and gunshot residue testimony;
- (c) the prosecutor committed misconduct by "painting Mr. Matthews in the light of Mr. Joshlin's actions by referring to 'they' and 'them'" during trial and closing arguments; and
- (d) the prosecutor committed misconduct by having a witness read from a SCOPE printout containing Matthews' criminal history to establish his height, and commenting that the printout contained arrest information.

3. "Mr. Matthews' constitutional rights under the Sixth, Fifth and Fourteenth Amendment guarantees to a fair trial, due process and equal protection under the law were violated when an unqualified expert was allowed to testify regarding gun residue on a red glove which was unconnected to any crime and which further was unconnected to Mr. Matthews as well as being unacceptable as unproven and was hypothetical not actual evidence." *Id.* at 31 (as in original).

4. "Mr. Matthews' Fifth, Sixth and Fourteenth Amendment rights to due process and equal protection were violated when the trial court allowed the prosecutor and his witness to vouch that they, in fact, had the 'right guy.'" *Id.* at 37.

5. "The district court erred when it stated it had no discretion to allow additional peremptory challenges, and violated Mr. Matthews' Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial." *Id.* at 40.

6. "Mr. Matthews' conviction and sentence are unconstitutional, in violation of his Sixth Amendment right to effective assistance of counsel, and his Fourth and Fourteenth Amendment right to due process, fair trial and equal protection." *Id.* at 42. Specifically, in this claim, Matthews complains that his trial counsel was ineffective for not moving to sever the charges against him from the charges against his co-defendant. *Id.* at 42-48.

19 On July 13, 2015, respondents filed their motion to dismiss (ECF No. 16). Respondents
20 argue in that motion: that Claims 2c, 3, 4 and 5, are unexhausted in state court, and should be
21 dismissed; and that Claims 1, 3, 4, and 5 fail to state claims that are cognizable in this federal habeas
22 corpus action. *See Motion to Dismiss*, pp. 8-12. Matthews filed an opposition to the motion to
23 dismiss on August 31, 2015 (ECF No. 23). Respondents did not file a reply.

1 Discussion

2 Exhaustion

3 A federal court may not grant habeas corpus relief on a claim not exhausted in state court.

4 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is

5 intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*

6 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the

7 claim to the highest state court, and must give that court the opportunity to address and resolve it.

8 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,

9 10 (1992). A claim is fairly presented to the state's highest court if, before that court, the petitioner

10 describes the operative facts and legal theory upon which the claim is based. *See Anderson v.*

11 *Harless*, 459 U.S. 4, 6 (1982) (*per curiam*); *Picard*, 404 U.S. at 275; *Batchelor v. Cupp*, 693 F.2d

12 859, 862 (9th Cir. 1982).

13 Claim 2c

14 In Claim 2c, Matthews claims that his federal constitutional rights were violated because the

15 prosecutor committed misconduct by “painting Mr. Matthews in the light of Mr. Joshlin’s actions by

16 referring to ‘they’ and ‘them’” during trial and closing arguments. *See* Third Amended Petition,

17 pp. 21-30. Respondents argue in their motion to dismiss that Claim 2c is unexhausted in state court.

18 *See also* Motion to Dismiss, pp. 4, 8.

19 In response, in his opposition to the motion to dismiss, Matthews states, somewhat

20 ambiguously, with respect to the exhaustion of Claim 2c: “While not specifically stated, the

21 prosecution’s inflammatory lumping of the defendants together in all allegations presented to the

22 jury was a violation of his Fifth and Fourteenth Amendment rights to have a trial free of

23 prosecutorial misconduct.” *Id.* at 8. Matthews does not point to anywhere in his briefing in the

24 Nevada Supreme Court where he raised Claim 2c. *See id.* The court has examined Matthews’

25 opening brief before the Nevada Supreme Court and determines that Matthews did not assert

26 Claim 2c. *See* Appellant’s Opening Brief, Exhibit I. Claim 2c is unexhausted in state court.

1 Claim 3

2 Respondents also argue in their motion to dismiss that Claim 3 is unexhausted. *See Motion*
 3 *to Dismiss*, pp. 8-9. Claim 3 is Matthews' claim that his federal constitutional rights were violated
 4 "when an unqualified expert was allowed to testify regarding gun residue on a red glove which was
 5 unconnected to any crime and which further was unconnected to Mr. Matthews as well as being
 6 unacceptable as unproven and was hypothetical not actual evidence." First Amended Petition, p. 31
 7 (as in original).

8 On his direct appeal, Matthews asserted a claim regarding the expert testimony regarding gun
 9 residue on the red glove. *See Appellant's Opening Brief*, Exhibit I, pp. 24-28. However, the
 10 question raised by respondents' motion to dismiss, with respect to the exhaustion of Claim 3, is
 11 whether Matthews presented that claim to the Nevada Supreme Court as a matter of federal
 12 constitutional law.

13 Matthews argues in his opposition to the motion to dismiss that he did present a federal
 14 constitutional claim to the Nevada Supreme Court, as evidenced by his citation, in the claim in his
 15 opening brief on appeal, to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and
 16 *Frye v. United States*, 293 F. 1013, 54 App. D.C. 46 (1923). However, neither *Daubert* nor *Frye*
 17 was decided on constitutional grounds; both concerned the application of federal evidentiary rules,
 18 which, of course, were not applicable at Matthews' state-court trial. *See Kumho Tire Co., Ltd. v.*
 19 *Carmichael*, 526 U.S. 137, 147 (1999) ("In *Daubert*, this Court held that Federal Rule of Evidence
 20 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony ...
 21 is not only relevant, but reliable.'") (citations omitted)); *Duvardo v. Giurbino*, 649 F.Supp.2d 980,
 22 996 (N.D.Cal.2009) ("Because this is a federal habeas case, this court does not determine whether
 23 the expert's testimony was properly admitted under state law, and does not consider whether the
 24 evidence passes muster under the Federal Rules of Evidence or [*Daubert*], which was not decided on
 25 constitutional grounds.") (citations omitted)); *see also Wilson v. Sirmons*, 536 F.3d 1064, 1101-02
 26 (10th Cir.2008) ("*Daubert* does not set any specific constitutional floor on the admissibility of

1 scientific evidence.”). Matthews’ citation to *Daubert* and *Frye*, in his brief before the Nevada
 2 Supreme Court, did not indicate to that court that he intended to raise a federal constitutional claim
 3 with respect to the expert testimony concerning gun residue on the red glove.

4 The court has examined Matthews’ briefing of his claim regarding the expert testimony, as it
 5 was presented to the Nevada Supreme Court (*see* Appellant’s Opening Brief, Exhibit I, pp. 24-28),
 6 and determines that Matthews did not, there, fairly present the federal constitutional claim that he
 7 now asserts as Claim 3 in this case. Claim 3 is unexhausted in state court.

8 Claim 4

9 Claim 4 is Matthews’ claim that his federal constitutional rights “were violated when the trial
 10 court allowed the prosecutor and his witness to vouch that they, in fact, had the ‘right guy.’” *See*
 11 First Amended Petition, p. 37. Claim 4 concerns the testimony of a prosecution witness -- Las Vegas
 12 Metropolitan Police Officer Brian Walter -- regarding his opinion concerning the accuracy of his
 13 identification of Matthews. *See id.* at 37-39. Respondents argue in their motion to dismiss that
 14 Claim 4 is unexhausted in state court.

15 Matthews made the following argument in his opening brief on his direct appeal in the
 16 Nevada Supreme Court:

17 A witness may not give a direct opinion on the defendant’s guilt or innocence.
 18 *U.S. v. Kinsey*, 843 F.2d 383 (9th Cir.1988). An implicit or explicit opinion as to the
 19 defendant’s guilt is an improper lay or expert opinion because the determination of
 20 the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007), *citing State v. Garrison*, 71
 21 Wash.2d 312, 315, 427 P.2d 1012 (1967). Courts have also concluded that
 22 “[p]articularly where such an opinion is expressed by a government official, such as a
 23 sheriff or a police officer, the opinion may influence the fact finder and thereby deny
 24 the defendant of a fair and impartial trial.” *State v. Barr*, 123 Wash.App. 373, 98
 25 P.3d 5418 (2004). In the case at bar, Officer Walter testified that he was both 100 per
 26 cent certain of his identification, and that he had “the right guy.” (A. App. Vol. 3, p.
 954. Grounds for reversal.

24 Appellant’s Opening Brief, Exhibit I, pp. 28-29. The court determines that this argument, with the
 25 citation to federal authority, as well as Washington state cases dealing with the constitutional
 26 implications of a witness testifying with respect to his or her opinion of a defendant’s guilt or

1 innocence, was sufficient to alert the Nevada Supreme Court that a federal constitutional claim was
 2 made. Claim 4 is exhausted in state court.

3 Claim 5

4 Claim 5 is Matthews' claim that “[t]he district court erred when it stated it had no discretion
 5 to allow additional peremptory challenges, and violated Mr. Matthews' Fifth, Sixth and Fourteenth
 6 Amendment rights to due process and a fair trial.” First Amended Petition, p. 40. Respondents
 7 argue in their motion to dismiss that Claim 5 is unexhausted in state court.

8 On his direct appeal, Matthews asserted a claim regarding the trial court's failure to allow
 9 additional peremptory challenges. *See* Appellant's Opening Brief, pp. 29-30. However, there,
 10 Matthews presented that claim purely as a matter of state-law error; specifically, Matthews argued to
 11 the Nevada Supreme Court that the trial court had discretion under NRS 16.040(2) to allow
 12 additional peremptory challenges, and erred in not doing so. *See id.* Matthews' entire argument,
 13 with respect to this claim, in his opening brief on his direct appeal, was as follows:

14 NRS 16.040(2) provides in relevant part that : “If there are two or more parties
 15 on any side and their interests are diverse, the court may allow additional peremptory
 16 challenges, but not more than four, to the side with the multiple parties.” While
 17 Pierre Joshlin was essentially caught red handed with a weapon immediately after a
 18 foot pursuit, Jemar Matthews who is unconnected to Pierre Joshlin in any way, was in
 19 a very different position and had different interest in the jurors. It should be noted
 20 that the co-Defendants used all 8 of their peremptory challenges on the jury. The
 21 Court was in error that it had no authority to even consider additional peremptory
 22 challenges. (A. App. Vol. 2, p. 270). [Footnote: The Honorable Judge Barker was
 23 actually brand new to the bench at the time, having abruptly replaced Judge Halverson
 24 in contravention of EDCR 7.10(b). Defense attempted to make record, but no info
 25 was available. (A. App. Vol. 2, pp. 260-263).]

26 *Id.* There was no indication in Matthews' briefing before the Nevada Supreme Court that he
 27 intended to raise a federal constitutional issue with respect to the number of peremptory challenges
 28 he received. *See id.* Claim 5 is unexhausted in state court.

29 Cognizability of Claims

30 Respondents go on to argue that Claims 1, 3, 4 and 5 fail to state claims that are cognizable in
 31 this federal habeas corpus action. *See* Motion to Dismiss, pp. 9-12. The court finds that

1 respondents' arguments in this regard will be better addressed when the court considers the merits of
 2 all petitioner's remaining claims, after respondents file an answer and Matthews files a reply.

3 Moreover, with respect to Claims 3 and 5, as is discussed above, the court finds those claims
 4 (along with Claim 2c) to be unexhausted in state court, and Matthews will be required to elect to
 5 either abandon those claims or move for a stay to allow their exhaustion in state court. Regardless of
 6 what Matthews elects to do with respect to Claims 3 and 5, respondents' arguments that those claims
 7 are not cognizable in federal court might become moot before the court reaches their merits.

8 Therefore, the court declines, at this time, to reach respondents' arguments that Claims 1, 3, 4
 9 and 5 fail to state cognizable claims, and the court denies respondents' motion to dismiss to that
 10 extent, without prejudice to respondents making the same or similar arguments at an appropriate
 11 time in their answer.

12 Petitioner's Election Regarding Claims 2c, 3 and 5

13 As is discussed above, the court determines that Claims 2c, 3 and 5 are unexhausted in state
 14 court. With respect to Claims 2c, 3 and 5, therefore, Matthews will be directed to make an election,
 15 to either file a notice of abandonment of those claims, indicating that he elects to abandon those
 16 claims and proceed in this case with the litigation of his remaining claims, or, alternatively, file a
 17 motion for stay, requesting a stay of this action to allow him to return to state court to exhaust
 18 Claims 2c, 3 and 5. If Matthews elects to file a motion for stay, he must make a showing that a stay
 19 is warranted, as prescribed in *Rhines v. Weber*, 544 U.S. 269 (2005). If Matthews does not, within
 20 the time allowed, file a notice of abandonment of Claims 2c, 3 and 5, or a motion for a stay to allow
 21 exhaustion of those claims in state court, Matthews' entire first amended habeas petition will be
 22 dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

23 ///

24 ///

25 ///

26 ///

1 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 16) is
2 **GRANTED IN PART AND DENIED IN PART**. The court finds Claims 2c, 3 and 5 of
3 petitioner's first amended petition for writ of habeas corpus (ECF No. 14) to be unexhausted in state
4 court. With respect to Claims 2c, 3 and 5, the court will direct petitioner to make an election, as
5 described below; in all other respects, the motion to dismiss is denied.

6 **IT IS FURTHER ORDERED** that petitioner shall have **30 days**, from date of entry of this
7 order, to file a notice of abandonment of Claims 2c, 3 and 5, or a motion for a stay of this action to
8 allow him to exhaust those claims in state court, as described above.

9 **IT IS FURTHER ORDERED** that, if petitioner files a notice of abandonment of Claims 2c,
10 3 and 5, respondents shall then have 90 days to file an answer, responding to petitioner's remaining
11 claims. After respondents file an answer, petitioner shall have 60 days to file a reply.

12 **IT IS FURTHER ORDERED** that, if petitioner files a motion for a stay to allow
13 exhaustion of Claims 2c, 3 and 5 in state court, respondents shall thereafter have 30 days to file a
14 response to that motion, and petitioner shall thereafter have 20 days to file a reply.

15 **IT IS FURTHER ORDERED** that, if petitioner does not, within the time allowed, file a
16 notice of abandonment of Claims 2c, 3 and 5, or a motion for a stay to allow exhaustion of those
17 claims in state court, petitioner's entire first amended habeas petition will be dismissed pursuant to
18 *Rose v. Lundy*, 455 U.S. 509 (1982).

19

20 Dated this 13 day of November, 2015.

21

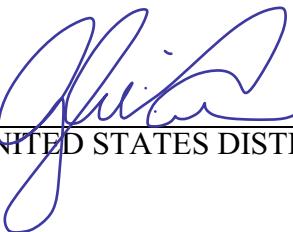
22

23

24

25

26



27

UNITED STATES DISTRICT JUDGE